No. 15077

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

ESSEX WIRE CORPORATION, A MICHIGAN CORPORATION dba ESSEX WIRE CORPORATION OF CALIFORNIA, RESPONDENT,

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On Petition For Enforcement Of An Order Of The National Labor Relations Board

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BRIEF FOR ESSEX WIRE CORPORATION, A MICHIGAN CORPORATION, D/B/A ESSEX WIRE CORPORATION OF CALIFORNIA,

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BRIEF FOR ESSEX WIRE CORPORATION, A MICHIGAN CORPORATION, D/B/A ESSEX WIRE CORPORATION OF CALIFORNIA,

JURISDICTION

The respondent admits jurisdiction of this Honorable Court under the National Labor Relations Act, the Respondent Company being a multi-state business, which manufactures and sells wire products in various parts of the United States.

Statement of the Case

I

The Board's findings of fact and conclusions of law.

The Board erroneously found that the respondent company violated Section 8 (a) (1) of the Act by demanding that an employee surrender signed Union Membership Cards in his possession, by prohibiting rival union activity during employee rest periods, and requiring the removal of buttons denoting adherence to the rival union, while permitting employees to wear buttons of the encumbent union. The subsidiary facts upon which these findings and conclusions were based do not support the Board's findings of fact and conclusions of law and are summarized below:

At all times material to this case, the exclusive bargaining representative for the respondent company's employee was Silvergate District Lodge No. 50, for and on behalf of Automotive Electric Lodge No. 1930 of the International Association of Machinists, hereinafter referred to as I.A.M. The collective bargaining agreement between the company and the I.A.M. during the period here relevant was entered into January 15, 1953, and extended through May 15, 1954. (References to the printed record are designated, "R"). (R. 38; 159-162).

Late in 1953, several of the company's employees became interested in the United Mine Workers, District 50 Union, (hereinafter referred to as the U.M.W.), as their bargaining representative, and in December 1953, started an organizational campaign on behalf of the U. M. W.

Active in this campaign were employees, J. C. Hamilton, his wife, Elizabeth Ann Hamilton, his sister, Mrs. Lorraine Evans and James A. Juhl.

J. C. Hamilton and James A. Juhl actively campaigned during company time. (R. 173, 209-210, 243, 307, 309, 311, 386, 388, 396, 419, 443). The activity of the U.M.W. came to the attention of management and on January 14, 1954, a bulletin was posted prohibiting union campaigning during working hours. (R. 158-159, 166, 168-172). Instructions were requested from the home office in Detroit and those instructions were in turn passed on to the responsible officials in the plant through the plant's manager, Mitchell J. Simon. (R. 166-172). All employees both I.A.M. and U.M.W. adherents were advised through management that the company was not going to participate in any factional disputes and that company time was not to be used for the purpose of continuing the inter-union controversy. The orders that were issued applied as well to the I.A.M. as to the U.M.W. (R. 173-174).

The witness for the petitioner, Elizabeth Ann Hamilton, was an employee who was discharged from the respondent company for refusing to do work that was assigned to her and walking off the job and out of the plant without authorization. (R. 259, 328, 329, 410).

The said witness claimed prior to her leaving the job that management discriminatorily had put her on a job which was extremely difficult and that management had neglected to give her gloves for the job and that she cut her hands. Prior to leaving the plant, with full opportunity for medical treatment of the alleged cuts, and after having talked to the plant nurse, and not having exhibited the cuts to her, she left the plant. (R. 259, 328, 329).

In making the complaint before the National Labor Relations Board, her hands were covered with gauze but she did not display the cuts to any official of the said Board. (R. 489).

The witness for the petitioner, Loraine Evans is an employee who was discharged by reason of her inability to get along with her fellow employees. No matter where in the plant the said employee was placed, frictions arose between her and other employees. (R. 73, 338, 343, 392, 393, 395, 445, 446). Prior to the incident leading to her discharge, a notation was made in her file kept in the personnel office, that any further problems relating to her inability to get along with her fellow employees would result in her discharge. (R. 417-418). Further difficulties did arise, and she was discharged. The witness J. C. Hamilton, husband of Elizabeth Ann Hamilton, was on several occasions, observed campaigning during company working hours. (R. 307, 309, 311, 396, 419). He was considered to be a trouble maker by his superiors and frictions arose between him and other employees. (R. 225, 231, 232, 233, 263, 307, 309, 311, 476, 477, 478, 479). He was guilty of rank insubordination of Mr. Mitchell J. Simon, the manager of the plant. (R. 231-233, 476, 477, 478, 479).

Gerald Pipmeier, another witness who the petitioner intended to call, failed to appear at the hearing and evidence was introduced of a letter written by the said Pipmeier to the respondent company relative to his entire satisfaction with the company while he was employed by it. (R. 488).

James A. Juhl, one of the parties active in the UMW movement in the plant, distributed UMW membership cards and was asked by his foreman, Clyde Casey, if he was distributing such cards, Juhl agreed that he was, and Casey demanded that the cards be turned over to him. This took place during company working hours. Juhl returned the executed cards to employees who had executed them in violation of Casey's orders. Nothing appears in the record which would indicate that Casey had anything else in mind but to return them at the end of Juhl's shift.

The respondent company, in the midst of various dissensions due to the rivalry between the I.A.M. and the U.M.W., took all steps that conceivably or reasonably could be required of an organization to maintain a policy of neutrality. The trial examiner believed that the company was sincere in its efforts to pursue a middle-of-the-road policy. (R. 59).

There is nothing in the record according to the testimony of Mr. Simon, the manager of the plant, or any of his responsible managerial employees which would indicate that the employees were restricted in their organizational activities during rest periods and lunch hours. The only testimony which appears in the record is that of J. C. Hamilton, the husband of a discharged employee, and

James Juhl, both strong campaigners for U.M.W. representation, and who did considerable campaigning during working hours, and who were considered to be chronic trouble makers.

II

The Board's Order

The order requires a posting by the respondent company of a notice to all employees, stating that the respondent company will cease and desist from doing certain things which it is alleged constituted unfair labor practices. It is felt by the respondent company that they have done nothing which would constitute unfair labor practices and should not be required to post the notice.

Argument

I

THE BOARD IMPROPERLY FOUND THAT RESPONDENT INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN VIOLATION OF SECTION 8 (a) (1) OF THE ACT.

A. Surrender of executed membership cards.

Petitioner argues that the evidence affirmatively establishes that respondent company demanded the surrender of executed U.M.W. authorization cards by employee Juhl. In direct violation of the order, the employee Juhl returned the cards to the persons who executed the same. It is certainly within the power of the company to exer-

cise its managerial right to take any reasonable steps to insure that no employee, during working hours, does anything but work for the company. If the employee Juhl had cards in his possession during working hours, it would seem that a demand for the surrender of the same until he had completed his shift would not be unreasonable. If the employee Juhl had acquired these membership cards in authorized rest periods, during lunch hours, or outside of working hours altogether, it would have been incumbent upon him to have advised Foreman Casey of that fact, but there appears nothing in the record which would indicate that employee Juhl attempted to justify his position in any manner whatever. In the absence of any effort on his part to show justification, or that the cards were executed lawfully outside of working hours, it would appear to be reasonable to assume that he was violating company policy and direct orders against campaigning on company time. If the employee Juhl were selling tickets to a raffle, circulating a petition, unconnected with any type of union activity, conducting himself in any manner which appeared to be violating company policy relative to personal activity on company time, it could not be argued that management acted wrongfully in requiring the employee to turn over the tickets, petition or whatever other instrumentality the employee was using to distract himself and other employees from their work during working hours.

The petitioner is attempting to make capital of this isolated instance of alleged unfair labor practice. If it is an unfair labor practice, it is obviously contrary to the "determined effort on the part of management . . . to main-

tain a policy of neutrality", as found by the Board. (R. 59). Such an isolated remark cannot be the basis of a charge of unfair labor practices.

In *NLRB vs. Montgomery Ward and Company,* 157 F 2 486, the Court held that where employer's instructions unequivocally proclaimed right of employees to join, form, or assist the unions and forbade interference with any union activities on behalf of employees, and forbade anti-union discrimination in any form, isolated remarks over a period of fifteen months by some five minor supervisory employees in plant employing 1,600 persons could not be considered as reflecting policy of the employer, so as to constitute an unfair labor practice under this section.

See also *NLRB vs. England Bros., Inc.,* 201 F 2 395, where it was held that mere words of interrogation or perfunctory remarks by employee not threatening or intimidating in themselves, made by an employee without anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as a part of espionage upon employees does not amount to an interference with, restraint or coercion on employees in connection with their union activities.

In the present case the Board has reached far, and, it is submitted, fruitlessly, for facts upon which to base a charge, in relying upon the conversations between Foreman Casey and James Juhl.

B. Campaigning during rest periods

The testimony of responsible officials of the respondent company would indicate that no member of the U.M.W. at any time asked any responsible person in management whether or not they could campaign during

rest periods. There is no testimony from any of the witnesses called who represented management that the question of campaigning during rest periods was even mentioned and affirmatively that nothing was said by any responsible managerial individual relative to campaigning during rest periods. Petitioner relies on three employees who are no longer employed by the respondent company, Elizabeth Ann Hamilton, Loraine Evans, and James Juhl, one of the employees having been discharged for wilful disobedience to company's policies and orders, namely, Elizabeth Ann Hamilton, another employee who was discharged by reason of constant, prolonged and habitual inability to get along with her co-workers, namely Loraine Evans, the third employee, James Juhl, who according to the testimony adduced at the hearing, spent considerable company time campaigning for the U.M.W., and generally made himself obnoxious. They rely on a fourth employee, presently employed by the company, the husband of the woman discharged for disobedience of orders, a trouble maker, a person himself guilty of rank insubordination, and one whose testimony is incapable of belief. Contrasted with the testimony of these disgruntled employees, we have the testimony of the plant manager, Mitchell Simon, who has had a great deal of experience in union activities and who was extremely cautious relative to any steps taken or to be taken in connection with an impending labor controversy. Upon contacting his home offices in Detroit, he was advised to take a middle-of-the-path course, not siding with either the I.A.M. or the U.M.W., and not doing anything to interfere with any factional disputes but to leave the controversies to the two unions.

After having received the information from the home office, the manager carefully instructed his foreman and other responsible employees relative to the middle-of-the-road course that the company of necessity would be required to follow, and thereupon posted a notice relative to campaigning during working hours. After having received word from the home office, a delegation of employees contacted Mr. Simon and his position was again reiterated, that of a middle-of-the-road course.

At the outset it was clear in the minds of the top level of management that the path which had to be taken under the law, which has been enunciated in a great number of cases including *NLRB vs Cleveland Cliffs Iron Co.*, 133 F 2 295, was one of strict neutrality.

A substantial portion of the testimony of nearly all of the Board's witnesses, as will more fully appear hereinafter, was not believed by the Trial Examiner. Moreover, the Trial Examiner believed that the company was attempting to implement a policy of neutrality. Yet, for purposes of fact finding regarding the alleged instances of unfair labor practices, much of the testimony of the various witnesses, who were shown to have distorted and stretched the truth to the breaking point, must have been accepted as gospel, while obviously, in view of the findings of fact, the testimony of the manager of the plant and his responsible supervisory personnel was utterly disregarded.

See *Ohio Associated Tel. Co. vs NLRB*, 192 F 2 664. The Court there held that where warnings by employees' supervisors that union affairs should not be discussed on employer's premises were sporadic and were repudiated

by employer and never enforced, there was no unfair labor practice in violation of this chapter.

In *Pittsburgh S.S. Co. vs NLRB,* 180 F 2 731, 340 U.S. 498, it was held that a shipowner who instructed captains and officers that they must maintain strict impartiality and not interfere with union activities as long as activities did not conflict with discipline or proper operaton, and who instructed men positively as to their rights through individual letters, was not guilty of an unfair labor practice in failing to communicate to the crew, instructions given to captains.

C. Removal of buttons.

It is clear from the testimony of manager Simon that he was advised by his Detroit office that U.M.W. adherents should be allowed to wear their buttons, as long as they didn't pass them around and otherwise campaign during working hours. It is equally clear that the plant supervisory personnel were instructed relative to these orders from headquarters. The Trial Examiner believed that guidance was obtained from the Detroit office and that the management of the local plant made a determined effort to "maintain a policy of neutrality." (R. 59). The Trial Examiner did not believe that Mr. Simon ever ordered any employee to remove a U.M.W. button. (R. 51).

But in relation to the wearing of U.M.W. buttons, the board found in accordance with these disgruntled employees' testimony, as against the testimony of responsible managerial officials in spite of the fact that much of the testimony of these various employees is obviously either totally false, or grossly mistaken. Neither the manager nor

any responsible supervisory employees of the respondent company testified that any employee was ordered to remove his button, either I.A.M., or U.M.W., although it is clear that all responsible managerial employees advised the employees of the plant that they were not to use the buttons for campaign purposes such as passing the buttons around during working hours or doing any other act which could be considered campaigning during working hours.

D. Respondent's Position in General.

It seems inconceivable, in view of the trial examiner's findings to the effect that there was a "determined effort on the part of the respondent's local management to give effect to its current I.A.M. contract and, at the same time to maintain a policy of neutrality" (R. 59), plus clear cut evidence of manager Simon's instructions from his home office, plus the dissemination of these instructions to employees under him, that the Board could find that violations existed by reason of the demand for the surrender of union membership cards, that an explicit finding could be made that there was an affirmative prohibition against union activity during rest periods and that the same management was ordering employees to remove campaign buttons.

The Trial Examiner made specific finding that the testimony of the Board's witness, James Juhl, was, "erroneous, insofar as it purports to indicate a general prohibition of organizational activity on company property during non-working time." (R. 47).

The Trial Examiner specifically found that the production manager never "ordered Hamilton or any other

employee to remove a U.M.W. button in the plant." (R. 51).

The Trial Examiner did not believe J. C. Hamilton in relation to his conversations with Mr. Simon. (R. 58).

He did not believe Elizabeth Ann Hamilton's version of the circumstances under which she departed from the plant, nor did he believe J. C. Hamilton's version of the same. (R. 70).

He found that Loraine Evans was a trouble maker, "involved in Cross Complaints and controversy with fellow workers". (R. 73), and of necessity must have disbelieved her testimony.

The Trial Examiner refuted Juhl's sweeping generalizations that he was instructed to campaign "off the company property, out of the company time", in favor of Simon's "genuine effort, to implement the respondent's policy as he understood it." (R. 83).

Can it be said, then, that the Board had sufficient evidence to sustain its order in view of the above findings, in view of the obvious distortion of the truth practiced by the Board's witnesses, most of whom were disgruntled maladjusted misfits.

An analysis of the testimony in the "Transcript of Record," would indicate that at best the petitioner relies upon a thin thread of vengeful accusations by disgruntled employees, most of whose testimony, at best, is improbable in the face of the excellent employer-employee relations of respondent company prior to the incidents in question, and upon which testimony they are attempting to sustain their burden of proof in order to enforce an unfair order.

The respondent company found itself squarely in the

middle when frictions arose between the I.A.M. and the U.M.W. adherents. If the company by inadvertence or otherwise deviated from the proverbial "middle-of-the-road", it would find itself in trouble with either the I.A.M., or the U.M.W., depending on the direction of the deviation. However, regardless of the tensions of the moment, the struggles between the unions, the dissensions in the plant, management was burdened with the responsibility of continuing production. In so doing it had the right to exercise its managerial prerogatives. There still existed the relation of employer and employee between the respondent company and its employees. Congress, while safeguarding, through enactment of the laws in question, the right of employees to engage in concerted activities for purpose of collective bargaining or other mutual aid or protection, did not weaken the underlying contractual bonds and loyalties of employer and employee. See *NLRB vs Local Union No. 1229,* 346 U.S. 464.

It would be next to impossible to enforce lawful requirements relative to campaigning during working hours, where such activity was apparent and increasing in intensity, causing dissension in the plant, without disturbing the sensitivities of one side or the other. But it cannot be argued that management did not have the right to make reasonable regulations designed to minimize any interferences with plant efficiency and employees' best capabilities.

See *NLRB vs Rockaway News Supply Co.,* 197 F 2 111, 345 U.S. 71; *NLRB vs Montgomery Ward and Co.,* 157 F 2 486; *NLRB vs Edinburg Citrus Ass'n,* 147 F 2 353.

CONCLUSION

In the light of respondent Company's efforts to follow a truly neutral path, in the absence of more than a thin thread of evidence to connect management with alleged unfair labor practices, and the apparent innocuous nature of the isolated instances, contrary to admitted company policy, it is respectfully urged that the Board's petition be denied.

Respectfully submitted

HOLT, MACOMBER AND GRAHAM
and FRANKLIN B. ORFIELD

By.....